*See page 104*

No. 1045.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD COMPANY;
CENTRAL TRUST COMPANY OF NEW YORK;
D. O. MILLS AND HOMER S. KING, AS TRUSTEES,

Defendants and Appellants,

VS.

THE UNITED STATES,

Complainant and Appellee.

FILED
JUL 20 19[illegible]

# Appellants' Reply Brief.

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FILED THIS .............. DAY OF .............................., A. D. 1904.

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Clerk.

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## Appellants' Reply Brief.

The "Statement" with which the "Brief for United States" opens, is more largely the expression of counsel's conclusions as to the effect of the evidence in view of his opinions of the law, than an uncolored statement of the facts.

We beg leave to repudiate the chapter of the "Brief for United States" written under the heading "Defendants' Contentions", and to refer to "Appellants' Brief"

on file herein as more aptly, and seriously, stating our contentions.

As to the chapter of the "Brief for United States" written under the caption heading "Mistakes of Counsel for Defendants", we have this to say:

In **United States v. Winona &c R. R. Co., 165 U. S. 463-482,** the Supreme Court had before it a grant of odd-sections for six sections in width on each side of the railroad in aid of which the grant was made (11 Stat. 195); which grant provided indemnity right to select from the odd-sections, within specified limits, "so much land * * as shall be equal" to the quantity of primary sections disposed of by the United States prior to definite location of the railroad. The court found that the lands in suit were erroneously certified to the Company (lands were certified, not patented, under that grant), but that the certification could not be canceled because of sales by the Company to persons whose title the Act of March 2nd 1896 had confirmed; and, considering the suggestion that the suit "may yet be maintained against the defendant railroad company for the value of the lands", the court said:

"If it be suggested that under the scope of these acts, though the suit must fail so far as it is one to set aside and cancel the certification, it may yet be maintained against the defendant railroad company for the value of the lands so erroneously certified, and that the decree should be modified to this extent, it is sufficient to say that, first, the Government has not asked any such decree; second, that it may be doubtful whether for the mere purpose of recovering money an action at law must not be the remedy pursued; but lastly, and chiefly, that it does not appear from this record either that the railroad company

received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant; and further, that it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for this erroneous certification. It will hardly be contended that, if, simply through a mistake of the land department, these lands were certified when at the time other lands were open to certification which could rightfully have been certified and which have since been disposed of by the Government to other parties, so that there is now no way of filling the grant, the Government can nevertheless recover the value of the lands so erroneously certified. In other words, the mistake of the officers of the Government cannot be both potent to prevent the railroad company obtaining its full quota of lands, and at the same time potent to enable the Government to recover from the company the value of lands erroneously certified."

The sense of which, as we understand it, briefly stated, is: That the court was of opinion that the *money value* of the land could not properly be recovered from the Company without showing that it had already received (the lands in suit excluded) *the full quantity* granted by the Act; and the court inclined toward the view that *an action at law was the proper remedy.* As the Government price for all lands of the same class is equal, it sustained no loss, or injury, because recovery of those particular lands could not be had, unless, those particular lands included, the Company had received *an excess of quantity;* from which it follows that where lands have been erroneously patented to a railroad company under a grant of quantity, and the patents cannot be canceled because of the confirmatory provisions of the Act of March 2nd 1896, the proper remedy is to charge the quantity of land

thus patented against the quantity granted, in final adjustment—provided the Company has not yet been certified, or patented, the quantity of land granted.

The Southern Pacific grant at bar is of land "*to the amount*" of ten odd-sections per mile; and, like the grant before the court in the Winona case, it provides for selection of other lands "in lieu" of such primary lands as the United States shall have disposed of prior to definite location of the contemplated railroad.

The official "Land Office Report. 1875"., of which this court will probably take judicial notice, shows (p. 409) that the estimated quantity of land granted to the Southern Pacific Railroad Company by the Act of March 3rd 1871, is 3,520,000 acres, while the estimated quantity it will receive under that grant (because of sales, and other disposition of lands by the United States prior to definite location of the railroad), is but 3,000,000 acres. This report is now before this court, however, in case No. 956, between the same parties (Tr. Vol. 3, pp. 702, 703); and it precludes the possibility of a showing here that the Southern Pacific "has received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant" (Quotation from Winona decision, *supra*).

To bring the Southern Pacific within the spirit, as well as within the letter, of the Winona decision, we showed by the uncontradicted testimony of Jerome Madden, its land agent, that the Southern Pacific grant had not yet been finally adjusted; and that patents had not yet been issued for a large quantity of land to which the Company's right to patent stands approved (Tr. Vol. 2, p.

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486). Mr. Madden was then asked to produce a statement of the quantity so approved but not yet carried to patent (p. 487)—and thereupon counsel for the United States gratuitously admitted that "the quantity called for by the preceding question of Mr. Singer exceeds 10,000 acres." (P. 488). As the quantity of land involved in this suit is not nearly equal to 10,000 acres, we accepted the admission, and pressed Mr. Madden no further.

On page 26 of our "Appellants' Brief" we referred to this admission in a three-line paragraph, a considerable portion of which three-line space is taken by the reference to "(Tr. Vol. 2, p. 488)" as the place where it is to be found. Counsel comes back with a chapter under bold, black caption-heading "Mistakes of Counsel for Appellants", under which, after so misquoting our reference to the admission as to omit therefrom "(Tr. Vol. 2, p. 488)", says "It was not in fact so stipulated"; and in proof of the charge quotes *another stipulation,* about a different matter, appearing at page 132 of the transcript.

In his "Brief for United States" in the case No. 956, now before this court, counsel (here and there) contended that the fact the Southern Pacific has not selected all indemnity land to which it is entitled, takes the Southern Pacific grant out of the rule in the Winona case (pp. 56, 57); which affords a pertinent suggestion that the stipulation under which counsel took cover to avoid effect of the admission to which we referred, was a stipulation given by us and not to us.

Assuming it to be satisfactorily shown, by the official report, the testimony of Mr. Madden and the admission of counsel on page 488 of the printed transcript, that because

of land sales made by the United States the Southern Pacific can never receive (these lands included) the quantity granted, and that the United States still holds a large quantity of land to which the Company is admittedly entitled to patent, we submit that this case is fairly within the rule in the Winona case that the value of the lands cannot be recovered from the Company in this case because here as there "it does not appear from the record either that the railroad company received an excess of lands, or has ever received (these lands included) the full quantity of lands provided in the grant."

It is true that the United States still holds a large quantity of land within limits of the Southern Pacific grant not yet selected or approved for patent, as well as a large quantity of such land which has been selected but has not been patented to that Company; but we fail to see the materiality of the distinction sought to be made between selected and unselected lands. In other words, the United States having in its hands lands to which the Southern Pacific is entitled to but has not been given patent, sufficient to supply the quantity transferred to the Company by erroneous patent, it strikes us as immaterial whether such withheld lands have or have not been selected or approved for patent, so long as patents have not been issued therefor.

This also answers the insinuation made on page 45 of the "Brief for United States", that we erred in correctly quoting a part without also quoting another part of the opinion in the Winona case.

We will now reply to the "Points" made by the "Brief for United States" in the order they are there presented.

## FIRST.

The first point made is that the right of the defendants to object that this case shows no grounds of equity jurisdiction, was waived by their failure to demur.

Equity jurisdiction for cancellation of patents, appearing on the face of the bill, *was shown by the proofs not to exist* as to any of the lands sold by the Southern Pacific Railroad Company, because of the provision in the Act of March 2nd 1896 that no patent for such land shall be canceled; and an action to recover the value in money of the lands, cannot be joined with a suit to cancel patents for other lands **(Cherokee Nation v. S. K. Ry. Co., 135 U. S. 641; Scott v. Neeley, 140 U. S. 107).**

It is well settled that a party cannot disguise an action at law by colorable suggestions of fraud, accounting, or the like; that the court will look at the proofs, and if there be no proof of matters which make a case in equity, it will dismiss the bill; and that it is a duty of the court to dismiss the bill *sua sponte,* where *the proofs* fail to show proper grounds of equity jurisdiction, notwithstanding no objection to jurisdiction in equity was made by demurrer, plea or answer.

The proofs in the case at bar make it apparent that what is said in the bill about determining which are *bona fide* purchasers, quieting title, annulling patents and so forth, was suggested to give color of right to sue in equity, protect the bill against dismissal on demurrer, and by forcing the defendants to answer and proofs, lay foundation for the contention made at the Circuit Court hearing, and renewed here, that it was then too late for objection to the jurisdiction.

It will be born in mind that these defendants objected to the jurisdiction at the Circuit Court hearing; the briefs of both parties being, substantially, the same there as here.

In **Mills v. Knapp, 39 Fed. 592,** the plaintiff in his bill claimed (as in the case at bar) an exact sum, and the defendant pleaded to the merits. It was insisted that the defendant by pleading to the merits had lost the right of objecting for the first time to the jurisdiction of equity at the hearing. But the bill was dismissed, because the plaintiff had an adequate remedy at law. Blatchford, J. said:

"Besides this, the plaintiff, on the face of his bill has a plain, adequate, and complete remedy at law. * * No other equitable relief is asked. In such a case it is not necessary that the objection should have been taken *in limine* in the answer. It is taken at the hearing, and that is sufficient. This is not a case where it is competent for a court of equity to grant the relief asked. Reynes v. Dumont, 130 U. S. 354; Kilbourn v. Sunderland, 130 U. S. 505. It is governed by the rule laid down in Lewis v. Cocks, 23 Wall. 466, where the court, finding the case to be an action of ejectment in the form of a bill in Chancery, ordered the bill to be dismissed, although the objection was not made by demurrer, plea or answer, or suggested by counsel; saying that, as it clearly existed it was the duty of the court *sua sponte* to recognize it, and give it effect. It results from these views that without inquiring into the merits of the case, the bill must be dismissed with costs."

To the same effect will be found **Litchfield v. Ballou, 114 U. S. 192.**

In **Lewis v. Cocks, 23 Wall, 466,** it was held that a party could not disguise an action of ejectment in a bill

by a colorable suggestion of fraud, accounting, etc., and use it in place of the common law remedy; that the court will look at the proofs, and if there be no proof of matters which would make a proper case of equity, it will disregard and dismiss the bill *sua sponte,* though there be no demurrer, plea, or answer setting up the objection to the court's jurisdiction. In that case the court, at page 469, said:

"Viewed in this light, it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain, adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. This principle in the English equity jurisdiction is as old as the earliest period recorded in its history, (Spence, 408, 420,) * * * *

In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel; nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect. (Hipp v. Babin, 19 How. 278; Baker v. Bibble, Baldwin, 416.)

It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. Where the complainant had recovered a judgment at law, and execution had issued and been levied upon personal property, and the claimant under a deed of trust had replevined the property from the hands of the marshal, and the judgment creditor filed his bill praying that the property might be sold for the satisfaction of his judgment, this court held that there was a plain remedy at law; that the marshal might have sued in trespass, or have applied to the Circuit Court for an attachment, and that the bill must therefore be dismissed. Knox v. Smith, 4 How., 289. In the present case the bill seeks to

enforce 'a merely legal title.' An action of ejectment is an adequate remedy."

The case at bar is a common-law action of assumpsit to recover a debt of specific amount, for which there would be "a plain and adequate remedy at law", if there be such a debt. What is said in the bill about determining which are *bona fide* purchasers, and quieting titles and annulling patents, is simply suggested to give color of right to sue in equity. The *bona fides* of the sales is not questioned. Under the Act of March 2nd 1896, if sales were made to *bona fide* purchasers of patented lands, then their titles were confirmed, and they have no interest in litigating the question as to the liability of their vendor to the Government for the price of the lands; hence these purchasers could not be properly joined as defendants. They have got all they bargained for—a clear title to their lands.

If plaintiff has a lawful money demand against the defendant Company for the price of land it has sold to *bona fide* purchasers, the remedy is just as efficient at law as in equity.

In **Oelrichs v. Spain, 15 Wall, 227,** the court said:

" In the jurisprudence of the United States this objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel. (Parker v. Winnepiseogee Co., 2 Black 551; Graves v. Boston Co., 2 Crouch, 419; Fowle v. Lardson, 5 Peters, 495; Dade v. Irwine, 2 How. 383.)

The 16th section of the Judiciary Act of 1789 provides 'that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law;' but this is

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merely declaratory of the pre-existing rule, and does not apply where the remedy is not 'plain, adequate and complete;' or, in other words, 'where it is not as practical and efficient to the ends of justice and to its prompt administration, as the remedy in equity.' (Boyce v. Grundy, 3 Peters 215.) Where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury."

There was no relation of trust and confidence between the plaintiff and the defendant corporation in the suit at bar, to be the foundation of a suit in equity.

In **Killian v. Ebbinghaus, 110 U. S. 573,** no objection to the jurisdiction of a court of equity was raised in the pleadings, but the bill was dismissed without prejudice on the ground that there was an adequate remedy at law. The court said:

"The case is similar to the leading case of Hipp v. Babin, 19 How. 271, which was dismissed by the Circuit Court on the ground that there was an adequate remedy at law. Upon appeal to this court the decree was affirmed. * * * And the court declared as a result of the argument, 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and completé remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' See also Parker v. Winnepiseogee Co., 2 Black 545; Grand Chute v. Winegar, 15 Wall. 373; Lewis v. Cocks, 23 Wall. 466. And this objection to the jurisdiction may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel."

The bill in that case was dismissed for want of jurisdiction. It is a well established rule that consent cannot

confer jurisdiction; hence the bill was dismissed by the court of its own motion.

In **Hoey v. Coleman, 46 Fed. Rep. 221,** it was held that the objection that there is a plain and adequate remedy at law is jurisdictional, and that a bill must be dismissed where such remedy exists, although the objection has not been raised by demurrer, plea, or answer. The court said:

"Upon the authority of Shelton v. Platt, 139 U. S. 591, the present bill must be dismissed, because the case made is one in which there is a plain, adequate and complete remedy at law. It has been adjudged frequently by the Supreme Court, prior to the cases of Reynes v. Dumont, 130 U. S. 254, and Brown v. Iron Co., 134 U. S. 530, that the objection that there is plain and adequate remedy at law is jurisdictional, and should be enforced by the court of its own motion; but in those cases the court indicated that the objection should not be entertained in a case when the relief sought is of an equitable nature, unless it is raised by the defendant before he enters on his defense at large; that is, by a demurrer, or plea. The defendants have not raised this objection even by answer. * * *

In the case of Allen v. Car Co., 139 U. S. 659, the Supreme Court dismissed a bill filed to restrain the collection of a tax, upon the ground that there was an adequate remedy at law, notwithstanding the objection was raised in that court in the first instance, and had not been taken by plea, demurrer or answer in the Circuit Court. In the opinion the cases of Reynes v. Dumont and Brown v. Iron Co., *supra*, are referred to, but the former rule, as declared in many adjudications, that the objection may be raised notwithstanding it has not been taken by demurrer or plea, is again applied."

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In **Buffalo v. Town, &c, 85 Va. 222,** the court said:

"If a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction in the pleadings, and objection on that ground may be made at any time in any court."

In **Jones v. Bradshaw, 16 Grattan (Va.) 361,** Judge Robertson said:

"When the bill alleges proper matter for the jurisdiction of a court of equity (so that a demurrer will not lie), if it appears on the hearing that the allegations are false, and that such matter does not in fact exist, the result must be the same as if it had not been alleged, and the bill should be dismissed for want of jurisdiction."

Against this doctrine, the "Brief for United States", on page 13, cites a list of authorities, which will be considered here in the order stated there.

**(a).** The first case relied on by counsel for the United States, is U. S. v. S. P. R. R. Co., 117 Fed. 544. That is a decision by the same court, between the same parties, on the same contentions, as this case at bar; and there as here the case is pending on appeal to this court.

**(b).** The next case cited by counsel is Williams v. Monroe, 110 Fed. 322. In that case *the plaintiff,* not the defendant, objected to the jurisdiction. The court, after saying (p. 329) that "the objection that there is an adequate remedy at law should be taken at the earliest opportunity", held that "the jurisdiction of the court in this case is believed to be beyond dispute."

**(c).** The next case cited against us is Brown v. Lake Superior Co., 134 U. S. 530. There the court, remarking

that "He who asks equity must do equity", refused to allow defendant "to ignore its long acquiescence" and overthrow protracted litigation after extensive and costly proceedings carried out in reliance on its consent to and acceptance of the jurisdiction. The rule applied there is the law of that particular case—which has no parallel in the case at bar; for here there was no long acquiescence, protracted litigation, nor costly proceedings on the strength of consent to the jurisdiction.

**(d).** The next case cited against us is Insley v. United States, 150 U. S. 512. There the opinion starts out by saying that "The question in this case is whether the proceedings by *scire facias,* taken by the United States to enforce the forfeiture of McElroy's recognizance, operated to divest his title to the lands in dispute." The defendant contended that a certain judgment of the District Court of Kansas, affecting defendant's title to the property, rendered upon a writ of *scire facias,* was void because the laws of Kansas do not authorize proceedings by *scire facias.* The court, after saying "we do not find it necessary to determine whether a *scire facias* was a proper remedy or not," remarked that (p. 515) "even an objection that an action should have been brought at law instead of in equity, may be waived by failure to take advantage of it at the proper time." Nothing further is to be found in that opinion which has even the remotest bearing on the contention in support of which it is cited. Were the judgment void, it must forever so remain—hence it would seem immaterial at what time the objection came.

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**(e).** Perego v. Dodge, 163 U. S. 160, next cited by counsel, sustains our contention, by the following reference, with approval:

"It was held in Lewis v. Cocks, 23 Wall. 466, that if the court, upon looking into the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect though not raised by the pleadings nor suggested by counsel."

**(f).** The last case cited against us is Kilbourn v. Sunderland, 130 U. S. 505. In that case there had been protracted litigation and several suits consolidated into one before the objection to the jurisdiction was taken. The judgment of the court was based on the ground that the legal remedy in the circumstances of the case would not be as efficient as the equitable. In the opinion of the court

"The parties stood in a fiduciary relation to each other * * * as to five of these purchases fraud is charged; * * * * the transactions were all parts of one general enterprise involving trust relations; (the claims) all sprang from a series of operations that required accounting on both sides, and the accounting was apparently complicated and difficult. There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law."

Here were all the favorite heads of equity jurisdiction; fiduciary relations, fraud, accounting and trusts. There is none of these in the case at bar.

The case of Perego v. Dodge (163 U. S. 160), hereinbefore referred to (par. e) as cited against us, was an appeal from the Supreme Court of Utah, and the decision was largely based on its Code of Civil Procedure. But in that

case it was not the defendant, but the plaintiff, who took exception to the jurisdiction. Mr. Justice Fuller, said:

"Plaintiff, having voluntarily invoked the equity jurisdiction of the court, was not in a position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law."

He then added:

"Even a defendant who answers and submits to the jurisdiction of the court, and enters into his defense at large, is precluded from raising such an objection on appeal for the first time."

The last sentence above quoted is an *obiter dictum,* as there was no case before the court where a defendant, having failed to object to the jurisdiction by demurrer, or answer, had first raised the question on appeal. In the cases cited, however, the objection was first taken on appeal. Further on in that opinion the Chief Justice said:

"It was held in Lewis v. Cocks, 23 Wall. 466, that if the court upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings and suggested by counsel. To the same effect is Oelrichs v. Spain, 15 Wall. 211."

So even when first suggested on appeal the court will dismiss a bill where there are "found none at all of the matters which would make a proper case in equity." If the defendant corporation is indebted to the Government for the value of the lands it has sold, then the plaintiff has an efficient remedy by an action at law.

In **New York v. Memphis etc., 107 U. S. 214,** the court said:

"We have lately decided, after full consideration of the authorities, that an assignee of a chose in action, on which a complete and adequate remedy exists at law cannot, merely because his interest is an equitable one, bring suit in equity for the recovery of the demand. Hayward v. Anderson, 106 U. S. 672. He must bring an action at law in the name of the assignor to his own use. This is true of all legal demands standing in the name of a trustee and held for the benefit of cestuis que trust. * * * In view of the early enactment by Congress in the sixteenth section of the Judiciary Act (Rev. Stat. 723), declaring, 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law,' the rule laid down in Hayward v. Andrews (supra) is entitled to special consideration from the courts of the United States. This enactment certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts."

The case at bar does not present a single element of equitable jurisdiction.

The seventh amendment to the constitution declares that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This right cannot be impaired by blending a claim properly cognizable at law with a demand for equitable relief.

In **Scott v. Neely, 140 U. S. 107,** Mr. Justice Field said:

"The constitution in its Seventh Amendment declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact. In the case before us the debt due the complainant was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal courts. * * * This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the Judiciary Act of 1789 enacted that such suits 'shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had in law'; and this prohibition is carried into the Revised Statutes, Sec. 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate, and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity."

In Scott v. Neely the question of equitable jurisdiction seems first to have been raised in the appellate court.

In **Bussard v. Houston, 119 U. S. 352,** Mr. Justice Gray delivering the opinion of the court, said:

"Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side * * * In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort, or for money had and received."

To the same effect will be found **Ambler v. Choteau, 107, U. S. 586; Carter v. Allen, 149 U. S. 451; Atlanta v. Western R'y, 50 Fed. Rep. 790.**

## SECOND.

The second point made by the "Brief for United States" is, that the lands in suit were excepted from the Southern Pacific grant, because those lands were within claimed limits of the Jurupa Rancho (hence *sub judice*) at date the Company's grant attached.

We do not question the rule of law, that lands covered by a Mexican Grant claim of specific boundaries, *sub judice* at date a railroad land-grant would otherwise attach, except such land from the railroad grant; *but we say that the lands in this suit were not within claimed limits of the Jurupa Rancho at any time.*

As shown in our "Appellants' Brief", pages 3 to 14, Bandini asked confirmation of his full claim, defined the boundaries of his Jurupa Rancho claim in his petition, no person disputed or denied the boundaries thus defined, each of the several decrees confirmed his claim to the boundaries defined, and the patent follows those decrees;

making it apparent that Bandini got what he asked for, and all he asked for, *or at any time claimed.*

No controversy, or dispute, as to claimed limits, or confirmed boundaries, was presented to the United States Commissioners, or to the District Court. To the contrary, the several decrees confirm, and the patent conveys, the "Jurupa" as claimed and prayed for—and the lands in suit are not within that patent. In other words, the lands patented as the "Jurupa" are the identical lands claimed, prayed for, and confirmed as the "Jurupa"; hence to say that the lands in suit are not embraced by the patent, is to say that they are not and never were within claimed limits of the "Jurupa."

The contention that these lands were within claimed limits of the "Jurupa", is based solely on the fact that they are covered by a map made by Reynolds; but, as shown in our "Appellants' Brief", pages 3 to 14, the *status* of these lands in suit was at no time in anywise affected by the making, or existence, of that map.

The Act of July 23rd 1866, cited by counsel on page 20 of his brief, is inconsequential here. As shown on pages 3 to 14 of our opening brief, no lawful survey of the "Jurupa" could be lawfully made until the claim had been "finally confirmed"; and, further, the survey was required to follow the final decree of confirmation. Final decree in the "Jurupa" case was not made until March 2nd 1875, pursuant to Mandate of the Supreme Court (Tr. Vol. 2, p. 507)—long after the Reynolds survey; which survey, the Commissioner of the General Land Office found "discarded the plain requirements of the (District Court) decree." (Tr. Vol. 1, p. 331).

Counsel suggests that may be there was no appeal from the District Court decree—but this requires no further reply than the foregoing reference to the Supreme Court Mandate.

## THIRD.

The third point made by the "Brief for United States", involves three propositions; namely: That this suit is maintainable as a suit (a) to quiet title to lands, (b) to cancel patents for lands, and (c) for alternative relief in money judgment.

(a). It cannot be maintained as an action to quiet title because, as shown by the pleadings and proof, *the defendants hold the legal title;* whereas plaintiff must hold the legal title, to maintain a suit to quiet title **(Dick v. Foraker, 155 U. S. 413-415** and cases cited; **Van Drachenfels v. Doolittle, 77 Cal. 296; Harrigan v. Mowry, 84 Cal. 467).**

(b. c.). It cannot be maintained as a suit to cancel patents, or as an action to recover a money judgment, for the reasons run out in subdivisions II and III of our "Appellants' Brief."

## FOURTH.

The fourth point presented by the brief under reply is that the Act of March 2nd 1896 conferred special equity jurisdiction upon the Circuit Courts to confirm titles of *bona fide* purchasers and render *money judgments* against railroad companies for the value of lands.

To say that the Act of March 2nd 1896 conferred equity jurisdiction on the Circuit Courts to render judgments in money for the value of lands erroneously patented to

and sold by railroad companies, is to say that those courts did not theretofore have such jurisdiction; for if such jurisdiction was at the time already possessed by those courts, then it cannot be said that such jurisdiction was conferred upon them by the Act of March 2nd 1896.

The only cases cited by counsel in support of this contention which have any bearing on it, are the decision of the Circuit Court in this case (117 Fed. Rep., 544), and the decision in United States v. Oregon Railroad, 122 Fed. Rep. 541. The decision in the last-mentioned case, on demurrer to the bill for no equity shown, overrules the demurrer in the following very doubtful language:

"It is true that in the particular case the demand is for a money decree, and this would be true in any case brought in pursuance of the request of the Secretary of Interior upon a claim made by a bona fide purchaser. The Act authorizes such suit, *and is the only authority for a proceeding to recover the price of the lands erroneously patented.*"

The other decisions cited relate solely to the authority of federal courts to recognize State statutes of right, modifying or enlarging equity jurisdiction.

It will be observed that the Act of March 2nd 1896, contains neither suggestion nor requirement that the money judgment contemplated be obtained in a *court of equity.*

The seventh amendment to the constitution declares that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This right cannot be impaired by blending a claim properly cognizable at law with a demand for equity relief.

In **Scott v. Neely, 140 U. S. 107,** Mr. Justice Field said:

"The constitution in its Seventh Amendment declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact. In the case before us the debt due the complainant was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal Courts. * * * This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the Judiciary Act of 1789 enacted that such suits 'shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had in law; and this prohibition is carried into the Revised Statutes, Sec. 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate, and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity."

In **Bussard v. Houstan, 119 U. S. 352,** Mr. Justice Gray delivering the opinion of the court, said:

"Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side. * * * In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort, or for money had and received."

To the same effect will be found **Ambler v. Choteau, 107, U. S. 586; Carter v. Allen, 149 U. S. 451; Atlanta v. Western R'y, 50 Fed. Rep. 790.**

## FIFTH.

The fifth point made by the brief under reply is, that "This bill is cognizable in equity as one brought to avoid multiplicity of suits."

As the United States is demanding payment of a definite sum from the defendant Company *only,* for certain lands alleged to have been erroneously patented to it, shown by the proofs to have been sold to persons whose title is confirmed by the Act of March 2nd 1896, it is hard to see where the multiplicity would come in. The Government could not split up its claim and bring a separate action against that Company for the price of each tract sold—and no demand is made against any other defendant; but the whole demand would have to be stated in one action at law. It is immaterial how many purchasers there were. They could not be parties because, their *bona fides* being admitted, they had no interest in the litigation. They got all they bargained for.

In **Northern Pacific R. Co. v. Cannon, 46 Fed. 232,** the court said:

"Where a bill fails to show any grounds of equitable relief the defect is one of jurisdiction, and this court cannot proceed to determine the merits of the controversy. Oelrichs v. Spain, 15 Wall. 227; Litchfield v. Ballou, 114 U. S. 190."

It would be as absurd for the United States to bring separate actions against the Southern Pacific for each tract of land sold by it, as for a merchant to bring separate actions for each item of a customer's bill.

**Herman on Estop. and Res. Ad., Secs. 220, 221, and 222,** says:

"A party cannot divide and recover in parts, in different actions, a claim which in its legal nature is indivisible. * * * That a party shall not be allowed to split up an entire and indivisible claim and recover upon it in fragments in different actions, is itself palpably reasonable and is well enough settled. A party should not be vexed with a multitude of suits for one and the same cause of action. There can be no reason given why he should be, but sufficient and numerous reasons why he should not. * * * If a party divide a single and entire cause of action once, to what limit is there, but the caprice and will of the party, to endless divisions? For what depends upon the mere caprice or will of an adversary may be said to be without limit. * * * To allow a single claim to be divided and recovered in parcels would be instituting an unreasonable doctrine that would necessarily lead to vexatious and endless litigation. To effectually prevent this, the law wisely holds that a party cannot recover in parts a claim which is in its legal nature indivisible. * * * So a judgment, recovered against one of two wrong doers, is an estoppel to an action by the plaintiff against both. Thus, where a bed and quilts were taken at the same time and by the same act, a recovery in trover for

the quilts was held to be a bar to a recovery in trover for the bed. * * * Where goods are sold, services rendered, or money received, under such circumstances that the different items while occurring at different times are but one transaction, the cause of action will be entire, and a recovery for any part will be conclusive against the right to sue for the balance. * * * The doctrine is settled beyond controversy that a judgment concludes the right of parties in respect to the cause of action stated in the pleadings in which it is rendered, whether the suit embraces the whole, or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, ensuing either upon a contract, or from a wrong, cannot be divided and made the subject of several suits, and if several suits be brought for different parts of the claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in other suits."

If the United States has a lawful demand against the Southern Pacific for lands erroneously patented to and sold by it, such demand is entire and indivisible, and there can be no multiplicity of suits growing out of it; nor have the purchasers any concern in such demand.

It is absurd to say that this suit avoids multiplicity of suits otherwise to be brought by *bona fide* purchaser defendants against the United States. The Act of March 2nd 1896 prescribes the procedure for them—and it is not to bring suit against the United States.

## SIXTH.

The sixth point made by the brief under reply is, that this suit is cognizable in equity as one to establish a trust holding of the lands if not sold, and a trust holding of the proceeds thereof if sold.

This point is clearly an afterthought; for there is neither allegation in the bill that a trust ever existed, nor prayer for decree establishing a trust.

The complainant relies, for the recovery sought, on the provisions of the Acts of Congress of March 3rd 1887, February 12th 1896, and March 2nd 1896. These Acts provide for two kinds of suits, only; one to cancel patents, and the other to recover a money judgment against patentee under a patent erroneously issued for lands sold to *bona fide* purchasers. These Acts do not create a lien upon moneys received from the sale of such lands; nor do they in anywise establish a trust in such moneys.

The Act of March 3rd 1887, provides that

> "The Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payments as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount."

The amendment to this Act of February 12th 1896, provides that where *bona fide* purchasers have paid the company less than the government price of similar lands, the amount demanded from the company shall be the amount paid to it by such purchasers. This amendment, construed together with the Act of which it is an amendment, does not change the effect of the original Act, except as to the amount to be demanded from the company in such special case.

The Act of March 2nd 1896, provides that

"The Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof."

Section 3 of the same Act provides that

"The Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

An authorization to bring suit for "an amount equal to the government price of similar lands," or "for the value of" the lands sold to *bona fide* purchasers, is neither authority nor direction to sue for the identical moneys received from the sale of the lands, nor for a decree establishing a trust in or a lien upon such moneys. If any remedy at all is afforded to the Government against the defendant by these provisions, it is for the recovery of a simple money judgment, enforcible against any of its assets subject to the lien of a judgment.

In the case of **United States vs. Winona etc. R. Co., 165 U. S. 480, 482,** the Supreme Court, construing the Act of March 3rd 1887, said:

"The plain intent of this section is to secure to him (the *bona fide* purchaser) the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the government *a simple claim for money against the railroad company* * * * *it may be doubtful whether for*

*the mere purpose of recovering money an action at law must not be the remedy pursued.''*

It is not alleged that the moneys realized from those sales constitute a separate fund in the hands of the defendant to which a lien could attach or in which a trust could be declared; nor does the bill show that defendant at any time treated the moneys realized from the sale of those lands differently from other moneys realized from the sale of lands by it, or that such moneys were ever kept separate from moneys received from the sale of other lands.

**Jones on Liens, Sec. 28,** says:

"Equitable liens have commonly been regarded as having their origin in trusts. Perhaps they are better described as analogous to trusts. Remedies at law are for the recovery of money. Remedies in equity are specific. * * * It follows, therefore, that in a large class of executory contracts, express and implied, which the law regards as creating no property rights nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, in addition to the personal obligation, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien', and which, though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing."

Again, **Sec. 34, Jones on Liens,** says:

"It is essential to an equitable lien that the property to be charged should be capable of identification, so that the claimant of the lien may say, with a reasonable degree of certainty, what property it is that is sujbect to his lien. Though possession is not necessary to the existence of an equitable lien, it is necessary

that the property or funds upon which the lien is claimed should be distinctly traced, so that the very thing which is subject to the special charge may be proceeded against in an equitable action, and sold under decree to satisfy the charge. A fund is not thus traced when it has gone into the general bank account of the recipient, or after it has been mixed with funds from other sources. Money which has been intermixed with other money cannot be the subject of an equitable lien after the money itself, or a specific substitute for it, has become incapable of identification." (Citing Payne vs. Wilson, 74 N. Y. 348; Grinnell vs. Suydam, 3 Sand. (N. Y.) 132; Drake vs. Taylor, 6 Blatchf. 14).

The moneys received from the sale of these lands having been mixed with moneys received from the sale of other lands at the time of their receipt, and many years, having passed since receipt of such moneys, it would be unreasonable for a court of equity to declare a trust in or attempt to create a lien upon, such moneys. The only relief (if any) which could be reasonably granted plaintiff, is a money judgment.

**Story's Equity Jurisprudence, Sec. 794, (13th Ed.),** states the rule as follows:

"It may be stated as a general proposition, that for breaches of contract, and other wrongs and injuries cognizable at law, Courts of Equity do not entertain jurisdiction to give redress by way of compensation or damages when these constitute the sole objects of the bill. For whenever the matter of the bill is merely for damages, and there is a perfect remedy therefor at law, it is far better that they should be ascertained by a jury than by the conscience of an equity judge. And indeed the just foundation of equitable jurisdiction fails in all such cases, as there is a plain, complete, and adequate remedy at law."

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And at **Section 794a** the same author says:

"So strictly has the rule been construed, that it has been thought that, even in cases where no remedy would exist at law—as for example in cases where a trustee by a breach of his trust has injured the property—a Court of Equity would not award damages therefor."

**Pomeroy's Equity Jurisprudence, Sec. 178,** also states the rule to be that:

"Whenever an action at law will furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded or needed; nor because the case involves or arises from fraud; nor because a contribution is sought from persons jointly indebted; nor even to recover money held in trust, where an action for money had and received will lie."

In the case of **Crocker v. Rogers, 58 Me. 342,** the court said:

"The case in principle is not unlike that of Russ v. Wilson, 22 Maine, 207. The object in that case, as in this, was to recover a sum of money, which it was averred was in the hands of the defendant, and which the plaintiff claimed, in equity and good conscience, belonged to him, and for an account. The plaintiff claimed that his remedy was in equity, because the case was one of trust. But the court answered that it is not every case of trust that is cognizable in equity; and trusts embrace a wide field, and that in most cases, a remedy may be sought by a suit at law, and much more appropriately than in equity; that proceedings at law are precise and direct to the object in view, and are simple and expeditious; while the proceedings in equity are latitudinary, multifarious, dilatory, and often vexatious; that various pretenses are often resorted to in order to uphold jurisdiction in equity, but that such pretenses should not be listened to with too much facility; that to yield

too inconsiderately to such pretenses, would, in the end, pervert justice, and render legal proceedings deservedly odious."

In the case of **Piscataqua F. & M. Ins. Co. vs. Hill, 60 Me. 184,** the court said:

"The whole substance of the bill is a complaint against William Hill, defendant, for breach of trust as treasurer. That breach, as the bill shows, is a failure on his part, with or without the assent of the directors, to account for the property and funds intrusted to him, and in his disposal of them to others, or conversion of them to his own use. The wrong is fully accomplished, and the only relief now to be obtained is compensation as damages. For this there is a full and adequate remedy at law." (See also Caleb v. Hearn, 72 Me. 232.)

In **Gaines vs. Miller, 111 U. S. 397,** it was held:

"Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received (Citing a list of authorities). The remedy at law is adequate and complete."

**Clark on Contracts, page 764,** under heading "Money received for the use of another," says:

"Whenever one person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay the latter, and the obligation may be enforced by assumpsit."

See also, **Lacombe vs. Forstall's Sons, 123 U. S. 570; Mills vs. Knapp, 39 Fed. Rep. 592; Litchfield vs. Ballou, 114 U. S. 192.**

As shown in our opening brief (subdivision III) if the United States has a lawful demand against the Southern

Pacific for the value of lands erroneously patented to and sold by it, the remedy is assumpsit, at law.

## SEVENTH.

The seventh point is, that a court of equity having taken jurisdiction of a suit on ground pertaining to its jurisdiction, it will retain jurisdiction "even to granting legal remedies".

As shown on pages 24 and 25 of our opening brief, this court's jurisdiction on grounds of discovery ended with the filing of defendants' answer; equity jurisdiction for cancellation of patents, appearing on the face of the bill, is shown by the proofs not to exist; hence the bill should have been dismissed *sua sponte* for no equity, in view of the proofs.

## EIGHTH.

This point is, that in making the Southern Pacific land-grant Congress expressly reserved the right and power to alter, amend or repeal the Act making the grant;. and that the Acts of March 3rd 1887, and March 2nd 1896, were passed in pursuance of such right and power to alter, amend and repeal.

We say of this reserved power of Congress to "alter, amend or repeal", that (1) it relates to the *construction and operation of the railroad* and not to the land-grant; that (2) were it true this reserved power relates to the land-grant, still the Act of 1887 and 1896 constitute no exercise of such reserved power, *because those Acts relate only to lands not granted;* and that (3) the provisions of the Act of March 2nd 1896, cannot be enforced against

this defendant Company—if for no other reason because it was not a party to the enactment.

(1). The provision relied on for this reserved power of Congress (14 Stats. 292, Sec. 20) reads as follows:

"Sec. 20. And be it further enacted, That the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic & Pacific Railroad Company, add to, alter, amend or repeal this Act."

To say that recovery of $1.25 per acre from this defendant Company for lands in suit, erroneously patented to and sold by it long after the railroad was constructed and accepted by the United States, and while the United States was receiving satisfactory use of the railroad in all ways contemplated, "will promote the public interest and welfare *by the construction of said railroad* and telegraph line and keeping the same in working order", is too absurd to discuss or consider.

(2) Were it in anywise true that Congress, in proper exercise of reserved power to alter, amend or repeal the land-grant, could by enactment make this defendant Company debtor unto the United States for lands granted by the Act under consideration, still Congress could not in the lawful exercise of that reserved power as such, declare this defendant debtor unto the United States for *other and different lands* than those contemplated by the granting Act; and here it is claimed, and held, that the

lands in suit were not granted by, but were excepted from, the granting Act.

Neither the Act of 1887 nor the Act of 1896 relate to lands granted to this defendant Company, but, on the contrary, each manifestly relates to lands not granted to it. The Act of March 3rd 1887 (24 Stats. 556,) after requiring the immediate adjustment of railroad land-grants provides:

"That if it shall appear, upon the completion of such adjustment, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any Company claiming by, through or under grant from the United States * * * it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification or other evidence of title theretofore issued for such lands, and to restore the title thereof to the United States." (Sec. 2).

Having canceled the patent, and restored the title to the United States, Section 3 of the Act provides that persons who purchased "in good faith * * shall be entitled to the land so purchased", and after canceling the patent and recovering the land the Attorney-General is directed to collect $1.25 per acre from the railroad company. It is respectfully submitted that cancellation of erroneous patents and restoration of title to the United States, would extinguish all obligation of the railroad company arising out of its attempted sale of the land; and having recovered the land, Congress would be powerless to recover, or create, a demand against the railroad company for the value of the land. In other words, the

United States is not entitled to both the land and the value of the land.

(3), The proof shows that most of the defendant Company's land sales were made prior to March 3rd 1887, that all those sales were made prior to March 2nd 1896, and that all the patents were issued prior to March 2nd 1896. The Act of 1887 related to sales theretofore made, and the Act of 1896 related to patents theretofore issued and lands sales theretofore made. The Act of March 2nd 1896, is declaratory and summary—and the operation of such statutes must be *in futuro*.

**Sedgwick on Stat. and Const. Law, 188,** says:

"A statute that * * creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective."

Besides each of these Acts, alike, fixes the amount to be paid by railroad companies at $1.25 per acre for lands erroneously patented to and attempted to be sold by them; *and this without regard to whether those companies received a greater or lesser price than* $1.25 *per acre.*

The provisions of this Act confirming titles was *ex parte* and gratuitous; nor was such confirmation *on condition* that the railroad companies pay the United States anything—the confirmation was absolute and unconditional. That Congress has the right, by legislative enactment, to confirm the titles, is admitted; but Congress is without constitutional power to adjudge or decree that railroad companies shall, because of such confirmation, be debtors of the United States. Whether the railroad companies are debtors of the United States, and if

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they are in what amount, are questions for the judiciary to determine. If Congress had the power to impose a debt of $1.25 per acre on railroad companies, it had equal power to impose a debt of $1000 per acre. This Act is an attempt, by retroactive legislation, to establish a debt and adjudge the amount thereof; it attempts usurpation of judicial authority; it is an arbitrary sentence to pay, passed without any hearing. The right to be tried by the "law of the land" is as old as Magna Charta.

In **Cooley on Constitutional Limitation (III), page 124,** it is said:

"To compare the claims of parties with the law of the land before established, is in its nature a judicial act. * * To pass new rules for the regulation of new controversies is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future they violate the definition of law as 'a rule of civil conduct'; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

In the Appropriation Act of 1870, there was a proviso that "no pardon by the President should be admissible as evidence in the Court of Claims." It was decided to be repugnant to the Constitution, as an attempt by Congress to exercise judicial power. In **United States v. Klein, 13 Wall. 147,** Mr. Chief Justice Chase, in delivering the opinion of the court, said:

"We must think that Congress inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish."

Discussing retrospective laws, **(Cooley, p. 455)** says:

"So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment."

In **Medford v. Learned, 16 Mass. 215,** a pauper had been supported by a town. Afterward the pauper's fortune improved, and the Legislature passed a law giving a town the right to recover from the pauper money expended in his behalf. Parker, Chief Justice, delivering the opinion, said:

"If it be true that this statute, instead of providing a remedy for an existing contract, must be construed to create a debt, or obligation, on a consideration which has passed, and which was not of itself a legal foundation for a promise, it would seem very clear that the statute was enacted improvidently, and that it could not have the intended operation. * * For no legislator could have entertained the opinion that a citizen, free of debt by the laws of the land, could be made a debtor merely by a legislative act declaring him one."

There was no contract existing on March 2nd 1896, creating an obligation on the part of the defendant Company to pay the plaintiff any sum for the lands it had sold. The Act of that date was an encroachment on the judicial department.

In **Union Pacific R. Co. v. U. S., 99 U. S., 760,** Mr. Justice Field said:

"To declare that one of two contracting parties is entitled, under the contract between them, to the payment of a greater sum than is admitted to be payable, or to other or greater security than that given, is not a legislative function. It is judicial action; it is the exercise of judicial power—and all such

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power with respect to any transaction arising under the laws of the United States, is vested by the Constitution in the courts of the country. In the case of The Commonwealth v. Proprietors, &c., a corporation of Massachusetts, the Supreme Court of the State, speaking in reference to a contract between the parties, uses this language. 'Each has equal rights and privileges under it, and neither can interpret its terms authoritatively so as to control and bind the rights of the other. The Commonwealth has no more authority to construe the character than the corporation. By becoming a party to a contract with its citizens the Government diverts itself of its sovereignty in respect to the terms and conditions of the contract and its construction and interpretation, and stands in the same situation as a private individual. If it were otherwise, the rights of parties contracting with the Government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt, or ill-judged use of misguided power. The interpretation and construction of contracts when drawn in question belong exclusively to the judicial department of the Government. The legislature has no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial powers, which would be contrary to the elementary principles of our Government, as set forth in the Declaration of Rights, 2 Gray 350.

The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

See also, **Pryor v. Downey, 50 Cal. 388; Ex parte Shrader, 33 Cal., 280.**

If the Legislature cannot construe a contract between the Government and an individual, *a fortiori* it cannot create, of its own will, such a contract.

In 1873 Congress authorized a suit against the Union Pacific Railroad Company and others. Mr. Justice Hunt, in delivering the opinion of the Court dismissing the bill on demurrer, said **(11 Blatchford 392)**:

"IV. The United States is the plaintiff in this suit, and the question arises, Is there a right of action in the United States for the causes thus specified, or can a right to recover for such cause of action be given to the United States by an Act of Congress? Congress may authorize its Attorney-General to institute suits to recover damages due to the United States, or to redress wrongs which are legally wrongs to the United States, but its action can scarcely create such damages, or cause acts to be wrongs to the United States which are, in their nature, wrongs to another. The United States cannot convert to itself the property of another, by its own declaration, in its own name, against A to recover a debt he may owe to B. Moneys recovered by the United States in such an action, like its other funds, will go into its general treasury, and form a part of its resources, to be disposed of according to law. So, if any individual has committed a breach of trust, or been guilty of fraud in discharging his duties as Agent of the Union Pacific Railroad Company, the cause of action to redress such wrong and to recover damages therefor, and the damages themselves, when recovered, belong to the corporation. The suit for such redress must be in the name of the corporation, as plaintiff. As a general rule, and under ordinary circumstances, no other party can be such plaintiff, and an authority by Congress to the Attorney-General to commence such action in the name of the United States, is valueless. Congress cannot thus appropriate

to itself what belongs to another. To give effect to such an act would be to deprive one of his property without due process of law. I do not doubt the power of Congress over the remedy to redress alleged wrongs—in other words, its power to regulate the conduct of suits, or to prescribe the form of action. But it cannot, under the form of regulating the remedy, impair contracts, or dispose of rights of property. It cannot itself adjudge that moneys are due to the United States, and by such judgment give authority for their collection."

This decision was affirmed in **98 U. S. 606;** where the Supreme Court said:

"The first suggestion of the legal mind on this inquiry is, that it will not be presumed, unless the language of the statute imperatively requires it, that Congress, by a retrospective law, intended to create any new rights in one party to the suit at the expense, or by the invasion of the rights, of other parties; or. where no right of action was founded on past transactions existed, that Congress intended to create it."

The United States had no right of action against the defendant for the price of these lands prior to March 2nd 1896; and if plaintiff now has a right of action in respect to them, it was created by the Act of that date. In other words, Congress, by its mandate, directed the courts to adjudge that the defendant was a debtor to the United States for the lands. By ratifying the sales of land Congress could not make the United States the creditor of the defendant corporation, or of its vendees.

The essentials of a contract to pay the sum demanded are wanting; *sufficient consideration and assent.*

**Sec. 1, Vol. 1, Parsons on Contracts,** says:

"A promise for which there is no consideration cannot be enforced at law. This has been a principle of the common law from the earliest times. It is said to have been borrowed from the Roman law. The phrase '*nudum pactum*'—commonly used to indicate a promise without consideration—certainly was taken from that law."

The plaintiff's contention is that Congress, having confirmed the sales of land erroneously patented, a right of action accrued to plaintiff for the value of the land, because it was a benefit to the defendant. The Act of March 2nd 1896 was, it appears, a purely gratuitous Act. The Railroad Company was simply passive. Even if there had been an express promise to pay the price made after the passage of the Act, no legal obligation would have resulted from it. It would have been a *nuaum pactum* based on a past consideration, and could not have been enforced. A past consideration is not regarded in law as a valuable consideration; it is simply a gratuity.

**Sec. 16, Vol. II, Parsons on Contracts,** says:

"It may be stated, as a general rule, that a past or executed consideration is not sufficient to sustain a promise founded upon it, unless there was a request for the consideration previous to its being done or made. This request should be alleged, in a declaration which sets forth an executed consideration, as that on which the promise is founded that is sought to be enforced. Without such previous request a subsequent promise has no force." etc.

In the case at bar there was neither a promise nor a request from the defendant. Of course where there is no sufficient consideration to support an express promise, a promise will not be implied.

In **Eastwood v. Kenyon, 11 A. & E. (39 E. C. L.) 411**, the subject was examined at length by Lord Denman, Chief Justice, who said:

"Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not said to have been at the request of the defendant, nor even of his wife while sold (though if it had, the case of Mitchinson v. Hewson, 7 T. R. 348, shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money."

In that case it was held that a pecuniary benefit, voluntarily conferred by the plaintiff and accepted by defendant, is not such a consideration as will support an action of assumpsit on a subsequent promise by the defendant to reimburse the plaintiff. Of course the case would be still stronger against the plaintiff where there is no promise.

It is not alleged there was any agreement, either before or after the Act of confirmation, by which the parties contracted that the defendant Company was to indemnify the plaintiff for confirming the titles of the purchasers to the land. The constituent elements of a contract were wanting here; neither an agreement, nor a valuable consideration.

**Vol. 1, Chapt. 1, Addison on Contracts,** says:

"There is no contract, unless the parties thereto assent; and they must assent to the same thing in the same sense * * * But a contract requires the assent of the parties to an agreement,

and this agreement must be obligatory, and as we have seen, the obligation must, in general, be mutual. This is sometimes briefly expressed by saying that there must be 'a request on the one side, and an assent on the other.'"

In **Jackson v. Galloway, 35 E. C. L. 34, Bosanquet, J.,** said:

"A request on one side, coupled with an assent on the other, is Lord Doke's aggregatio mentium which constitutes an agreement."

It is immaterial that some benefit may have accrued to the defendant company from the act of confirmation. The act could not per se create a contract without defendant's consent; nor would the law imply a contract because the defendant may have profited by it. A favor conferred implies no legal obligation to return the favor. It is a well established principle of jurisprudence that neither an individual nor a Government can of his or its own will impose a legal obligation on a party without that party's consent. If so, men would be reluctant to accept benefits. The acceptance of a benefit creates no debt. Liabilities cannot be forced on people. The only exception to the rule is the maritime doctrine of salvage where one volunteers to save a ship.

The case of **Falcke v. Scottish Imperial Ins. Co., Law Reports, Chancery Div., Vol. 34, p. 234,** (1887, 50 Vic.) is an authority in point that A, by doing an act for the benefit of B without a request, cannot make himself B's creditor. In the case cited a party had paid a premium on a life policy for the benefit of the insured that saved it, yet it was held that as he was a volunteer he

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could not recover what he had paid. In that case Cotton, L. J., said (p. 241):

"Now let us see what the general law is. It is not disputed that if a stranger pays a premium on a policy that payment gives him a lien on the policy. A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property or such payment. If he does work upon a house without request he gets no lien on the house or the work done. If the money has been paid or the work done at the request of the person entitled to the property, the person paying the money or doing the work has a right of action against the owner for the money paid or for the work done at his request. If here there had been circumstances to lead to the conclusion that there was a request by Falcke that this premium should be paid by Emanuel, then there would be a claim against Falcke or his representative for the money and I do not say that there might not be a lien on the policy. But in my opinion there is no evidence upon which we should be justified in coming to the conclusion that there was any request expressed or implied by Falcke to Emanuel to pay this money. An express request is not suggested. Was there an implied request? I think that in a case of this sort, when money is paid in order to keep alive property which belongs to another, a request to make that payment might be implied from slight circumstances, but in my opinion there is no circumstances here in evidence from which such a request can be implied."

And in the same case, at **page 248,** Bowen, L. J., said:

"I am of the same opinion. The general principle is, beyond all question, that work and labor done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any

obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.

There is an exception to this proposition in the maritime law. I mention it because the word 'salvage' has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

That a mere volunteer cannot, of his own will, make himself a creditor, see **Lampleigh v. Brathwait, 1 Smith's Leading Cases, 167.**

There are no circumstances in this case from which a request, or promise, can be implied.

**Black's Law Dictionary** defines "Privity of Contract" as:

"That connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between plaintiff and defendant in respect of the matters sued on."

The Act of March 2nd 1896, was entirely *ex parte,* and not based on agreement. The United States would have

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had an equal right to confirm the titles of purchasers without any request, or promise, and then sue them for the price of the land. (See **Lampleigh v. Brathwait, 1 Smith's Leading Cases, 167).**

**Wharton on Contracts, Sec. 784, 809,** says:

"We have already seen that privity, or reciprocal recognition, is essential to establish a contractual relation. Since the suit on a contract cannot be sustained unless there be a contractual relation between the parties, it follows that no one can sue on a contract to which he was not a party. It would in fact be destructive to society if strangers could intervene and undertake litigation in accordance with their own interests and tastes; and such intrusion can only be prevented by the right application of the rule that contracts can only be sued on by parties. * * *

Not only is the assent to a contract of the party charged, necessary to bind him, but this assent must be coincident with the formation of the contract. As a rule, a party to be made liable on a debt must assent to such liability. 'A cannot by paying X's debts unasked', says Sir W. Anson, 'make X his debtor', and he adopts as settled by high authority the rule that a man cannot of his own will pay another's debt without his consent, and thereby convert himself into a creditor."

In **Addison on Contracts, Bk. 2, Ch. 8. p. 504,** it is said:

"The action for money paid is founded on the notion that the money was paid by the plaintiff for the defendant at his request, and that the defendant in consideration thereof promised the plaintiff to pay him the amount so expended; for the law raises no implied promise in respect of a voluntary, unauthorized payment which the party was not called upon, or required, to make on behalf of another."

The United States voluntarily confirmed the land titles, and provided that the patents should not be canceled.

If this was an incidental benefit to the defendant company, it incurred no obligation to pay for it.

In **McGee v. City of San Jose, 68 Cal. 94,** the court said:

"It is well settled principle of law that one person cannot without authority pay the debt of another, and charge the amount so paid against the party for whose benefit the payment was made."

See, also, **Canney v. S. P. R. R. Co., 63 Cal. 501; Doe v. Culverwell, 35 Cal. 291; U. S. v. Driscoll, 96 U. S. 421; Merritt v. Scott, 50 Am. Dec. 368.**

NINTH.

This point is sufficiently answered in subdivision II of our opening brief.

TENTH.

This point is sufficiently answered on the first pages of this brief, in what we there said replying to the chapter of "Brief for United States" written under caption-heading "Mistakes of Counsel for Appellants."

ELEVENTH.

This contention is fully answered in our opening brief.

It is respectfully submitted that the bill should be dismissed.

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